Supreme Court of the United States

OCTOBER TERM, 1894.

No. 71.

THE BALTIMORE AND POTOMAC RAILROAD COMPANY AND THE PHILADELPHIA, WILMINGTON AND BALTIMORE RAILROAD COMPANY, PLAINTIFFS IN ERROR,

v.

CATHARINE LANDRIGAN, ADMINISTRATRIX OF THE ESTATE OF THOMAS J. LANDRIGAN, DECEASED, DEFENDANT IN ERROR.

BRIEF FOR DEFENDANT IN ERROR.

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STATEMENT OF FACTS.

This was an action below by the defendant in error, administratrix of Thomas J. Landrigan, her deceased husband, to recover damages against the defendants for the negligent killing of the said Landrigan on August 29, 1898, at the intersection of Virginia avenue and South Capitol street, in the city of Washington.

The decedent was a machinist employed at the roundhouse of the defendant on South Capitol street, south of the

intersection in question. His hours of work were from 6 p. m. to 7 a. m. every night, with an allowance of one hour, from 12 to 1 o'clock, at which interval it was his habit to go home to lunch, his home being situated on Virginia avenue southwest, north of the intersection in question, requiring him to cross the railroad tracks of the defendants at that point. South Capitol street, at its intersection with Virginia avenue, is divided by a parking or reservation in its center about 50 feet in width, thus making two crossings, a southeast and a southwest crossing (Rec., pp. 10, 16). Along Virginia avenue, at this intersection, the defendants maintained four tracks, running east and west, the first track on the south being known as the ladder or "lead" track, the track immediately north of it being the north-bound main track, the next track to the north being the south-bound main track, and the fourth or most northerly track being called the reservation or freight track. The ladder track extended westwardly from the crossing to an alley, and eastwardly of the crossing it extended to K street southeast. The round-house was a little to the south and east of the crossing. East of the South Capitol Street crossings were the "Jersey yards" of the company, all of the tracks in which were connected by switches with the ladder track, from which circumstance it derived its name of the "lead" or ladder track.

The ladder track, as stated, extends west of the South Capitol Street crossing to an alley and stops at its end at what is known as the property yard, where coal, ties, iron, and other commodities are stored for the use of the plaintiffs in error (Rec., pp. 8, 16). It was called the "blind" (Rec., p. 16) or "dead" track, because it does not lead anywhere in that direction (Rec., p. 17), having no outlet except to the east (Rec., p. 24). The portion of this ladder track lying west of the crossing was used for storing freight cars, but not passenger coaches (Rec., p. 8), and, as stated, for conveying coal, ties, iron, and other commodities to the com-

pany's property yard, no portion of this track lying west of the crossing being used for shifting or making up trains (Rec., pp. 17–23). It runs "down grade" from east to west across South Capitol street (Rec., p. 6).

At each of the two South Capitol Street crossings the defendants maintained guard or safety gates. At the southwest crossing, where Landrigan was killed, the distance from the gates to the southernmost rail of the ladder track was about 15 feet (Rec., pp. 16–22). The safety gates, at this point, were generally, if not always, kept down or closed after ordinary bedtime, from 10 or 11 o'clock at night, until the next day, regardless of the fact whether trains were passing or not (Rec., pp. 16, 17, 25, 27, 28, 29, 30); and although a watchman or gateman was supposed to be stationed there in charge of the gates, persons with vehicles found it necessary to request him to hoist the gates, and sometimes to wake him up out of sleep for the purpose in order that they might pass (Rec., pp. 27–30). After bedtime the gates were up only when some one asked to have them raised (Rec., p. 28).

At the time of the accident, a train of tourist or passenger cars was being made up in the "Jersey yards," and a train, consisting of eight or nine cars, had been pulled out on the ladder track some distance east of the crossing (Rec., pp. 6, 14). The most westerly of these coaches was a Pullman car, called the "Lylete," provided with what is known as a Janney coupler, while next to it was a tourist car provided with a Miller coupler. Each of these couplers was provided with a groove for coupling purposes, the intended process being the insertion of one end of a link in the groove of one of these couplers, the other end of the link in the groove of the other coupler, and a pin thereupon inserted in each coupler to prevent the link from drawing out. The Janney and the Miller couplers were, however, not only "not the same sort of couplers," but were of unequal height (Rec., p. 6); the employee of the plaintiffs in error charged with the duty of coupling

them "did not put the link in the slot of the Miller coupler because he could not get it in there;" he "coupled it the best way he could—the easiest way he could couple it;" if coupling two cars the drawheads of which came together plump and even, in coupling them with a link and pin, he would put the link in the slot and not on top of the coupler; but on this occasion, having put one end of the link in the slot of the Janney coupler, he laid the other end of the link on top of the Miller coupler instead of putting it in the slot; then inserted the pin (Rec., p. 7), there being nothing to keep in place the end of the link attached to the Miller coupler except the head or shoulder of the pin. "The link was put in the Janney all secure, and then laid over the top of the Miller, and a pin run through the top of the link and down through the hole in the Miller; there was a place in the Miller coupler for the link to go in, but it was a little lower, and it could not be put in there on account of that curve; they coupled the cars right on a curve." "When the pin was put down through the link and into the hole in the Miller coupler, the head of the pin was on top of the link, and the only thing to keep the link from slipping over the head of the pin was the shoulder around the head of the pin" (Rec., p. 13).

The result was that just as Landrigan was pursuing his accustomed journey to his home for his midnight lunch, and had reached the ladder track, the link slipped over the head of the pin, and the "Lylete" ran down grade, westwardly, over the southwest crossing, running over Landrigan and inflicting injuries from which he shortly afterwards died, running south for more than a hundred yards before it was stopped by striking some stationary cars, loaded with sand and coal, near the property yard. Motley, the employee who coupled the two cars, while engaged in the act informed the yardmaster that he "could [not] couple them up the way they were coupled;" to which the yardmaster replied,

"Couple them up some way and get them out of here" (Rec., p. 10).

At the time of this occurrence, the freight train, with engine attached, was standing across the most northerly of the four tracks, and a north-bound passenger train was due and actually passed immediately after the accident. Willhoit, one of the train crew connected with the disaster, testified that he ran down the north-bound track behind the Lylete; that he saw some one was hurt when he went down, but continued running until he could see what damage was done to the car, and then returned to find that Landrigan was the injured person whom he had seen (Rec., p. 15), and that the runaway car had passed the southwest crossing before No. 78, which was the north-bound passenger train, had reached there, the runaway car having just about gotten across the crossing when the engine of No. 78 began to cross it (Rec., p. 16).

It further appeared from the testimony that when the Lylette began its movement down the ladder track, after becoming uncoupled, the crew endeavored to stop it by using the brakes, but neither the front nor the rear brakes would work. Willhoit testified that he first tried the rear brake and could not get that to work; that he and Wilber then went to the front brake, and Hottal tried to work the rear brake, but did not succeed in stopping the car because it had gotten too much of a start (Rec., p. 13); that he did not know whether he testified at the coroner's inquest that he "did not think the brake was any good, or else it would have stopped the car," or that "the front brake was loose and was not doing any good" (Rec., p. 13.)

Motley also testified that the brake did not hold the car, and that he did not know what was the matter with it (Rec., p. 27.)

There was also testimony tending to show that a Pullman car, running at the speed of the car which is supposed to have struck Landrigan, would make "practically no noise

at all (Rec., p. 30), and that the light upon it was so located as to illuminate the platform only, which was its purpose, and that it would not illuminate the track or cast a reflection more than two feet beyond the bumper of the car. Willhoit testified that it was "dark, night-time, and he could not see (Rec., p. 13), while the nearest street or electric light is 75 yards from where Landrigan was struck and north of the tracks across which the freight train was standing (Rec., p. 10). A witness for years familiar with the locality, frequently passing there at night, testifies that he had never noticed whether this electric light furnished light of any consequence at the intersection of South Capitol street, and that a train standing in the position of the freight train at the time of the accident would have the effect to make it darker at the gates of the southwest crossing (Rec., p. 22).

Mr. Landrigan was found at the side of the ladder track and south of it (Motley, Rec., p. 8), lying on the south side of the outside rail of the ladder track, the most ~~western~~ southerly of the four tracks at that crossing (Willhoit, Rec., p. 12). Blood and fragments of flesh were found on the south side of the ladder track (Kappel, Rec., p. 21). When Willhoit reached him he states that Landrigan was "conscious to a certain stage," and when asked how the accident happened, answered, "I came under the gates and something struck me, and a whole string of cars ran over me" (Rec., p. 15).

The testimony further showed that the western end of the south track was used for storing cars and taking cars in and out for the purposes of the property yard; that these cars would lie there sometimes two or three weeks after being unloaded; that two cars were there, west of the crossing, on the ladder track for several days prior to the accident; that at this point the ladder track is 800 or 1,000 feet from any switch; that there was no shifting or making up or breaking up of trains on the southwest crossing on the south track, this work being done east of that crossing (Rec., pp. 23–24), and that the ladder track west of the southwest

crossing is always rusty (Rec., p. 22). Passenger cars were not stored or handled on the ladder track at that point.

The only witness called by the plaintiff having direct knowledge of the facts and circumstances connected with the accident were two employees of the defendants, employed in the service at the time of the accident and also at the time of giving their testimony, and that they were reluctant witnesses is abundantly shown by their evidence as set forth in the bill of exceptions. Defendants called no witnesses, and the court and jury were accordingly deprived of the light which could have been thrown upon the facts and circumstances of the case by the witnesses whom it was within their power to produce. Neither the yardmaster, nor any watchman or gateman, nor any other employee or representative of the defendants was called to deny or question the testimony that the gates were habitually down from about ten o'clock at night until six o'clock in the morning. The watchmen or gatemen on duty at the time of the accident were not produced to show whether the gates were in fact lowered at or shortly before the time of the accident, as a warning to passers-by, or whether they had not been down for several hours prior thereto, regardless of the fact whether trains were passing or not, in accordance with what the testimony for the plaintiff showed was the general usage or custom. It was not even shown that any watchman or gateman was on duty that night, or present either at the time of the accident or afterwards. Neither the yardmaster, Hottal, who was directing the making up of the train from which the Lylete was detached by its defective coupling, nor any other of its employees, was called upon to account for or explain the manner in which the cars were coupled, nor the manner in which the accident happened, nor why the brakes did not work, nor to show why suitable signal lights or other warnings were not displayed at the rear of the train. The defendants simply contented themselves with a motion to direct a verdict in their favor, on the ground

that the attempt of Landrigan to cross the tracks in order to reach his home for his accustomed midnight lunch, notwithstanding the fact that the gates were down. was conclusive proof of contributory negligence on his part, precluding recovery, and this notwithstanding the further fact that, under the evidence in the case, he had necessarily to pass under those gates, for the same purpose and under the same circumstances, in order to reach his home at all, every night during the nine years that he had been employed by the defendants at their round-house, and that during all this time the gates were habitually down, whether trains were passing or not.

The defendants' first, second, third, and eleventh instructions were simply elaborations of their request to direct a verdict in their favor. Their fourth and fifth instructions, to the effect that there is no presumption that the decedent complied with his duty to look and listen for approaching trains, is in conflict with the decision of this court in Continental Imp. Co. *v.* Stead, 95 U. S., 161, 194, while the sixth instruction was simply to the effect that there was no evidence to show the existence of any usage or custom to keep the crossing gates down after 10.30 p. m. in the evening until an early hour the next morning, in direct conflict with the evidence adduced, as shown by the bill of exceptions. The only questions in the case, therefore, are, first, Was there evidence of negligence on the part of the defendants, causing the death of Mr. Landrigan? and, secondly, was there evidence of contributory negligence on his part so conclusive as to require the court to take the case from the jury?

ARGUMENT.

The issue was raised by motion to instruct the jury to return a verdict for the defendants, and by sundry prayers, which were the equivalent of such a motion.

The controversy here is one principally of fact.

The sufficiency of the evidence is not the issue. That question is peculiarly one for the jury.

The trial judge was asked to instruct the jury to find for the defendants. Before this could have been properly done, it must have been made to appear either that there was no evidence of the defendants' negligence, or such clear and convincing evidence of contributory negligence of the deceased that no reasonable men could fairly differ about it. In the case of Douglas *v.* The Chicago, Milwaukee & St. Paul Railroad Co., 100 Wis., 407 (a case relied upon and quoted by appellants), the tests of the respective functions of judge and jury are thus stated in the opinion of the court:

"Where there is a reasonable dispute as to the evidentiary facts tending to establish negligence, or to the reasonable inferences, which a jury might draw therefrom, the ultimate fact as to whether the party charged with negligence is guilty, is for the jury; but where the facts are undisputed, and the inferences therefrom *all one way*, the controversy turns upon the question of law that must be decided by the court."

This court has clearly and strongly stated the rule in the following language:

"When a given state of facts is such that reasonable men may clearly differ upon the question as to whether there was negligence or not, the determination of the matter is for the jury. It is only where the facts are such that all reasonable men must draw the same conclusion from them, that the question of negligence is ever considered as one of law for the court." Grand Trunk Railroad Co. *v.* Ives, 144 U. S., 408.

The same tribunal in a later case quotes and endorses the above paragraph from the Ives case. Texas & Pacific R'w'y Co. *v.* Gentry, 163 U. S., 353–369.

The Court of Appeals of the District of Columbia, in the case of Cowen *v.* Merriman, 17 App. D. C., 186, sets out in the body of its opinion the test announced in the Ives case, and quoted approvingly in the Gentry case, and, applying that test to the facts in the Merriman case, says:

"In this case it may be well contended that the proof of contributory negligence on the part of the deceased is strong, and many reasonable minds might be decidedly inclined to conclude from it that the deceased was guilty of contributory negligence in causing the accident. But the state of proof is such, that we cannot say that *all reasonable men* would so conclude."

There is no discordant note in the cases in this jurisdiction on this subject, and further reference to them surely ought to be unnecessary. Applying the test (about which there ought to be no sort of question) to the facts of this case, it can be readily ascertained whether or not there was error on the part of the trial judge in refusing the motion to instruct.

I.

Defendants' Negligence.

In examining into and passing upon the testimony of the witnesses Motley and Willhoit, it is to be noted that both of them were, at the time they were examined, in the employ of defendants, and that they were unwilling witnesses against their employers:

The defendants are charged with three several acts of negligence, which, according to the contention of plaintiff, separately or in conjunction, caused the death of Thomas J. Landrigan. They are: (1) Defective coupling or a careless

and negligent coupling of the runaway car with the coach immediately in front of it; (2) defective and worthless brakes on both ends of the runaway car; (3) absence of a light and other danger signals. The testimony upon which the trial court passed in refusing defendants' motion is not only pertinent, but necessary in order to enable this court to determine if there was error below. We give a carefully prepared summary of the evidence on these points in the order stated above.

A—The Coupling.

Motley: Coupled the coach with the assistance of brakeman Willhoit and Hottal, the yardmaster. The car that broke away was a Pullman, and the car to which it had been coupled was a tourist car. The Pullman had a Janney coupler, and there was a Miller coupler on the tourist car. The Miller and Janney couplers would not couple. They were not made or intended to couple together. One was a little higher than the other, the Janney being the higher of the two, but don't remember whether or not one went over the other. One of the draw-heads was higher than the other. It was a very difficult coupling to make, and a link and pin had to be used to couple the cars together. * * * He did not know whether the difference in height made them less or more difficult to couple. He coupled the two cars in question by putting a link in the Janney coupler and putting a pin through the hole in that coupler; *then laid the link on top of the Miller coupler*, and put a pin down through it. In both the Janney and Miller couplers there is a slot for a link and also a hole for the pin to go in. He did not put the link in the slot of the Miller because he could not get it in there. He could not explain why he did not do it that way. It was a difficult coupling to make either way. He did not remember whether they tried to do it that way or not—he coupled it the best way he could; the easiest way

he could couple it—or whether the difference in the height of the two couplers had anything to do with causing him to put the link on top of the Miller coupler instead of placing it in the slot of the Miller * * * The pin held the link in position on top of the Miller coupler; the link could not very well go over the top of the pin which held it in place—leading over the switch, the two couplers rubbing together forced the pin up out the hole, so as to pry it up.

* * * The link was too short to put it in the slot of the Miller coupler, but the link was long enough to enable the pin to go down through the hole. Where the link is laid on top of the coupler instead of in the slot, he does not know what would be the effect upon the rear coach if a slack should take place by the cars coming together. The coupling which he made was a very ordinary coupling, and is made right along; possibly it might hold all right; he had never seen it break loose before; it was customary to couple cars by putting the link on top instead of through the slot; this coupling was caused to break away by the slack running up between the cars when they jolted together—by the Janney and Miller couplers running up together; the rubbing together made the pin raise up and broke it loose—when coaches are properly coupled together they break loose very often in that way; when two cars are properly coupled with a link and a slack is produced, causing them to bump together, they come apart sometimes, although this is very rare, and it is also very rare that the other coupling comes apart. * * * He does not remember what became of the link or pin after the car broke away (Rec., pp. 6, 7). * * * The link and pin used in making the coupling were the ordinary link and pin (Rec., p. 8). Ladder track is an ordinary down grade from the point where the car broke away toward South Capitol street (Rec., p. 6).

CROSS-EXAMINATION: * * * That if they had not made a link-and-pin coupling they might have pulled the cars out with a big heavy chain; a chain is used sometimes

when the draw-head is pulled all the way out; where there are two draw-heads, with a coupler in each draw-head, the ordinary way to couple them is to use a link and pin whenever the couplers are not alike (Rec., p. 10); followed runaway car down to crossing after he got rid of rest of cars; reached there about three minutes after the car passed over the crossing (Rec., p. 9).

REDIRECT EXAMINATION: Hottal, the yardmaster, was present when witness coupled the cars together; witness told him that he could [not]? couple them up the way they were coupled, and Hottal said, "Couple them up some way, and get them out of here." At that time the crew was waiting for the car on the main track, and they were in a hurry to get it out; he was having some difficulty to get it coupled when he made this remark to Hottal. It is not true that the cars would not couple at all; they would not couple without using a link and pin. The coupling was safe enough to pull the car out of the yard, and that was all that was wanted; it did not do it on that night because it broke loose; nothing extraordinary happened to make it break loose. * * * The couplings "slipped around," he supposed, when they were going around the curve, and that had a tendency to make them come apart; he supposed it was due to the slack caused by coming over the switch on the ladder track; the statement made by him at the former trial, that he "used a link, put a pin down through the Miller, just a temporary coupling to pull the car up this track, and put the link over the Miller, put the pin down in the Miller, and stuck a pin through the link, and the pin having a head on it held in that position—held the link in position to pull the car out—but when it got up on the curve the slack ran together, and probably the pin dropped down—the link jumped over or twisted off the head of the pin—that is as nearly as I can explain it to you about this coupling," was substantially correct. That after the car was coupled they pulled it probably 45 or 50 yards, and when

it got on the curve formed by the ladder track and the track from which they were bringing it, it broke away; that he knew this curve was there (Rec., pp. 10, 11). * * * They could have used a chain on that night, but did not have any to use when they wanted to get the car out; there were chains in the yard; he does not know whether the chain would have been perfectly safe or not; the car might have broken away by the chain becoming united or loose or breaking, unless it was very strong; that he did not remember examining the pin on the tourist car, but remembered looking at the pin in the Lylete, the Pullman car. This pin was still in the hole in the link, and this satisfied him that the link had pulled over the head of the other pin (Rec., p. 11).

RECROSS-EXAMINATION: The head of the pin would not go through the hole in the link and would hold it in position; that the draw-head was a big piece of iron fastened to the end of the car, and the coupler was attached to the end of the draw-head. When the draw-head is completely pulled out the coupler comes with it. When two cars are in that condition they have to use a chain to keep them together. When the cars have a complete draw-head and coupling attached, no chain is necessary, and they simply used a link-and-pin coupling when the couplers are not alike. This was the way they did on that night. There was nothing the matter with the draw-heads. They were simply different couplers and would not couple (Rec., p. 11).

Willhoit: Hottal (the yardmaster), Motley, and himself made the coupling. One car had a Miller and the one that broke away had a Janney coupler. It is impossible to couple a Miller and Janney together. It was on a curve, and therefore they used a link and pin. It was a secure coupling to pull the car around in the yard, but it was not a safe coupling to run over the road. It was sufficient for the yard and was very frequently done.

The couplings did not couple exactly, because they did not fit. You cannot couple two such couplings together, and have to use a link and pin. The Miller coupler is not as high as the Janney; it is a thinner piece of iron, and the draw-head is thinner than that of the Janney. The link was put in the Janney all secure, and then laid over the top of the Miller and a pin run through the top of the link and down through the hole in the Miller. There was a place in the Miller coupler for the link to go in, but it was a little lower, and it could not be put in there on account of that curve. They coupled the cars right on a curve. The curve swayed the car around and brought the Miller coupler out on the side like. *When the pin was put down through the link and into the hole in the Miller coupler, the head of the pin was on top of the link, and the only thing to keep the link from slipping over the head of the pin was the shoulder around the head of the pin;* that he supposes it would have been safer if they could have put the link through the regular place for that purpose in the Miller coupler (Rec., pp. 12, 13).

CROSS-EXAMINATION: He saw the coupling made, but did not make it himself. When they found cars with the old-fashioned draw-head, and wanted to couple them to a car with a Janney coupler, they used a link and pin, which was the usual coupling when they got cars of that kind; this was done very frequently, but it is not done so much now as formerly because they get more cars with the new equipment; that he did not say the Miller coupler was lower than the Janney, but that it was not as thick as the Janney, which made it apparently lower than the Janney when the cars came together; that they laid the link on top of the Miller because they could not get it into the groove; the top of the pin was holding it in place (Rec., pp. 14, 15).

B—The Brakes.

Motley: The men on the car, Hottal and Willhoit, did all they could to stop it; he saw these men putting the brake on at the end of the Pullman car next to him, but could not see what they did at the other end; he did not know whether they left the end next to him for the purpose of putting the brakes on the other end; the car ran a little over a hundred yards, probably, before it stopped; it was stopped by striking some cars down on the ladder track (Rec., pp. 7, 8). * * * He did not remember testifying at the former trial that they could not stop the car because of a "defect in the brake—the brake did not hold," but that it is true that the brake might have hung in some way; *the brake did not hold the car*, but he does not know what was the matter with it (Rec., p. 11).

Willhoit: When they were pulling the car out on the straight track he tried the brake and it appeared to be all right, but when some one hollered that this car had broken off he went to work on it again; *it did not seem to catch hold;* he dropped off the end of the car and caught the rear end of it—the head end—and at the same time Hottal got on the end that he got off of, called for Wilber to help him to put the brake on, and they did all they could to stop the car, but the car had got too much start. The brake seemed to work all right; he did not have any fault to find with the brake, only the car had got too much start. He first tried the rear brake and could not get that to work; then went to the other one. While he and Wilber were working on the forward brake Hottal jumped on and tried to work the rear brake; *they did not succeed in stopping the car* because it had gotten too much of a start (Rec., p. 13). * * * The car was running slowly when he started to put on the brake; he jumped off, went to the other end, and when he got there the

car was not running very fast. Hottal got on the rear end just as he got off; does not know whether or not he said at the coroner's inquest that "he did not think the brake was any good or else it would have stopped the car," nor could he say whether he testified at the inquest that the front brake was loose and was not doing any good. *The brake did not do any good* because the car had too much start. Wilber jumped off with him. You sometimes apply a brake and it does not "take up" right at first; could not say whether he noticed any slacking up of the car as a result of putting on the brakes, because he got off, and it was dark, night-time, and he could not see (Rec., p. 13). Followed the car down, practically kept with it, but was a little distance behind it (Rec., p. 14).

C—Lights and Signals.

Motley: "A white light in the vestibule of the Pullman in the little dome-shaped arrangement in the roof of the car—this was the only light hanging in the vestibule, and there was no light on the platform" (Rec., p. 8).

Cross-examination: "The lamp in the dome had a white shade or globe underneath—it gave a bright light—you could see it all right—the lamp was inside the door and the door was closed—the glass in the door extended about half way down, and the light shone through the glass in the door—the same sort of light was in both ends of the car" (Rec., p. 10).

Willhoit: "There was a light on both ends of the coach—there was a light in the coach, but none on the back platform" (Rec., p. 14).

Cross-examination: "Did not stop because, *by the light being in the car*, he thought perhaps there was a porter or somebody in there" (Rec., p. 15).

In other places in the testimony of this witness he testifies that the light was bright and could be seen on the ground, etc., but detailed reference to, and quotations from, it are given in another portion of this argument.

44 One thing is manifest: That both Motley and Willhoit place the light, in one portion of their testimony, in the roof of the car, protected by a shade or globe, and in another portion wholly within the car; but there is no pretense that there was a red or other signal light on the end or platform of the coach.

It is not claimed that any signals or warnings of any kind of the approach of the car were given.

II.

Alleged Contributory Negligence of Deceased.

Defendants charge that this contributory negligence which they would impute to deceased consists of two distinct acts on his part: (1) going under the closed gates; (2) failing to look and listen. Let them be disposed of in their order.

(1.) *Going under the closed gates.*

Appellants cite many authorities and quote *in extenso* from the opinions of the courts in support of the general proposition that to go under closed gates and on a railroad track constitutes negligence *per se*.

We have no quarrel to make, either with the decisions quoted and relied on or with counsel for citing them.

The principle as stated, and when applied to the ordinary case, where the gates are used as signals of danger or safety—danger when closed, and safety when opened—is obviously wholesome and sound.

If, therefore, the condition of the gates and their method of operation at the crossing where Landrigan was killed had

been normal; if at the time of his death and immediately preceding ~~and succeeding~~ the 29th of August, 1898, the gates at this crossing were lowered when danger was present and imminent, and were raised when danger was absent and not immediate, this action would never have been instituted. In fact the Court of Appeals in Railroad Co. *vs.* Carrington, 3 App. D. C., 101, 111, has passed upon this identical point, saying:

"The fact that there was a gate, and that it was the constant practice to lower it when trains were passing or about to pass, and that it was not lowered on this occasion, was one proper to be considered by the jury in determining the question of the contributory negligence of the plaintiff's intestate."

Upon the testimony of the witnesses, eight in number, it was shown for the plaintiff, and it is an uncontradicted fact in the record, that, at this crossing of South Capitol street, it was the rule and custom of the defendants to lower the gates at ten or eleven o'clock at night, and to keep them down throughout the hours of the night until the early morning, raising and opening them only when vehicles were there and parties in charge of them asked that they be opened to enable them to cross.

While the testimony of the witnesses is not entirely in accord on the point as to whether the gates were *ever* up when no trains were in sight or approaching (five out of the eight testified that they had never seen them up between the hours named on a single occasion except when the gateman was asked to raise them), they are as one on the proposition that it was the *rule*, the *custom*, to keep them down from ten or eleven o'clock at night until morning.

The Court of Appeals in the present case said:

"The gate had not been uniformly lowered and raised for the purpose of warning, on the one hand, or of assurance on the other. The evidence tended to show that the gates were often lowered from ten to eleven o'clock at night and kept

lowered until daylight the next morning, without regard to the passing of trains. Passengers desiring to cross in vehicles were frequently compelled to call up a gateman to raise the gate. Persons on foot would do the same thing or else pass under the gate and then across the tracks. This state of things had existed for some years, during which the deceased was almost nightly engaged in crossing the track at that point in going to and fro between the machine shop and his home" (Rec., pp. 61–62).

Defendants offered no evidence in opposition to or in contradiction of the testimony offered by the plaintiff on this point, or upon any other. Their failure to do so, where the witnesses who operated the gates, and who knew and could have testified better than any one else as to the exact facts, were their own employees, whom they could readily have produced if those facts would have been to their advantage, of itself creates a case for the deduction of inferences that the facts were adverse to them, upon which the plaintiff was entitled to have the jury pass (Am. Bell Tel. Co. *vs.* Nat'l Tel. Mfg. Co., 109 Fed. R., 976, 1018; *In re* Kellogg, 7 Am. Bank. Reg., 635; Graves *vs.* U. S., 150 U. S., 118, 120–'1; Runkle *vs.* Burnham, 153 U. S., 216, 225).

If this case were being argued *now* before a jury, we submit, respectfully, that there is in the record sufficient testimony to establish the following propositions:

(1.) That the gates were kept down all the time between the hours of the night heretofore stated, and, without variation, were not raised, except when a vehicle was to pass and a request to raise the gates made. This proposition by a clear preponderance of the evidence.

(2.) That there was a custom, usage, or rule, definite and fixed, to keep the gates down between the hours named, whether trains were in, or out of, sight, with an exception now and then when the gates were up and no trains were

passing or in sight. This proposition beyond a reasonable doubt.

(3.) That Landrigan, the deceased, had full knowledge of this custom or usage, and had many times before his death acted upon the faith of it. This proposition beyond a reasonable doubt.

But this court is not reviewing the action of the jury in deciding this issue with plaintiff. It is not to pass upon the question on which side is found the preponderance of the evidence. The question whether the jury properly exercised its peculiar function to weigh the evidence is likewise not, now and here, the subject of review.

The alleged error lies in the refusal of the trial judge to direct the jury to return a verdict for the defendants—in other words, whether "*the state of proof* [*in favor of the defendants*] *is such that * * * all reasonable men would so conclude.*"

So great is the weight of the evidence in plaintiff's favor that it *cannot be said* for defendants' contention here, as was said by the Court of Appeals in the Merriman case, "that the proof of contributory negligence on the part of the deceased is strong, and many reasonable minds might be decidedly inclined to conclude from it that the deceased was guilty of contributory negligence in causing the accident."

In the case on trial, the Court of Appeals said (pp. 61 and 62 of Rec.):

"Under this evidence, we do not agree with the contention that all reasonable minds must necessarily come to the one conclusion that deceased was guilty of contributory negligence in passing under the gate and attempting to cross the tracks, without any other act of negligence. Finding the gates closed under these circumstances, the deceased was not bound in law to take it as a warning of immediate danger, and to stop and wait and call for information to an unseen

gateman. in fact there was a gateman within sight or hearing at the time, there is nothing in the evidence from which it could be inferred."

To summarize—plaintiff's contentions are:

a. That the gates at the crossing, prior, at, and subsequent to Landrigan's death, were uniformly, or at least customarily, lowered at or about ten o'clock at night, and were kept down throughout the night, until the early morning, and were raised only when necessary to allow the passage of vehicles.

b. That deceased knew of this usage or custom, and had many times acted on the faith of it.

c. That the legal effect of this rule of the operation of these gates takes the case of Landrigan out of the general rule that it would be negligent *per se* to go under the closed gates.

The evidence upon which plaintiff relies to establish each of these propositions of fact has been collected from the record and is here succinctly set out under its appropriate head.

A—Condition of the Gates.

Webster: The gates at the southwest crossing of South Capitol street in the month of August, 1898, and prior thereto, whether trains were passing or not, were generally kept down—that was, as a rule. Of course, he could not say they were down all the time, but as a rule they were down after ordinary bedtime; for a number of years had occasion to cross the tracks back and forth both day and night, because business required him to go down there. He had gone along there at 11 or 12 o'clock at night and at all hours of the night, and it was his experience that these gates were *always* down after ordinary bedtime; that he was running a brick yard and this caused him to go down there very often at

night and to come home at all hours of the night, and he would *always* find the gates down continually; it did not make any difference whether the trains were passing or not, * * * crossed right over without hesitating because he found that was the regular condition of the gates whether a train was passing or not; did not see any effort made to raise them; has seen them down at all hours of the night after half past ten or eleven o'clock up to three or four o'clock in the morning. The gates were down and kept down, he supposed, until daylight; that when coming north at night, as a rule, he would have to get under the gates (Rec., pp. 16 and 17).

CROSS-EXAMINATION: After April, 1893, up to the spring of 1898, he had been in the habit of crossing the tracks at this crossing in the night-time on an average of about twice a week; some weeks he might have gone oftener than that; would return across the tracks as late as twelve to half past one o'clock. Since the spring of 1898 he has not paid a great deal of attention to these crossings, because he did not have much occasion to cross there. He has crossed there since that time at night, but not very often. Before Landrigan was killed he had occasion to cross there quite often; that he had not crossed there late at night since that time without seeing the gates down, but could not specify any particular time when this occurred. Could not recollect ever attempting to cross the tracks going *south* and finding gates down when he did not see a train or shifting engine in sight. Going north he has found the gates down and a train, shifting engine, or car moving in the vicinity of that crossing, and sometimes he has crossed there and found the gates down when he did not see any train, car, or engine in the vicinity; * * * that he has frequently crossed there at night and found the gates down when trains were actually about to pass, and he would see the gates down without any trains there oftener than he would see them there. When the gates were down trains might have been

approaching that crossing and he not have seen them, although they must have been a good way off if he did not see them (Rec., pp. 17 and 18). Redirect: That during the month of August, 1898, and subsequently thereto, he crossed there at night about twice a week, and the condition of the gates after the usual bedtime was about the same. He did not discover any difference in them as compared with what it was before Landrigan was killed (Rec., p. 19). Recross: That he had passed there prior to the accident when he had approached this crossing during the night (witness does not specify the hour) and found gates up and no trains in sight (R., p. 20).

Story: Was familiar with southwest crossing of South Capitol street and Virginia avenue, and had been traveling there about 15 or 20 years, both in the daytime and night-time; sometimes would pass there three or four times a day; sometimes maybe only once a week; then again would be six or seven times of a night, and then might lay off a week; that this practice had continued for 15 or 20 years; during this period had passed there at night, and had called the watchman several times to get the gates up; the gates were mostly down all the time when the trains were passing; when going home, somewhere between 12 and 4 o'clock, sometimes gates would be down, and he would have to call the watchman to get past; this was so when no trains were passing (Rec., p. 20).

CROSS-EXAMINATION: When he spoke of gates being down, he spoke from his personal knowledge; in crossing in the daytime, he found that they put the gates down when trains came along, and when trains were not coming they would put the gates up; in the night-time the most trouble he had with the gates in getting past was after 12 o'clock; sometimes they would put the gates down and maybe go to sleep, or something like that, and he would have to holler to get the gates up in order to pass by; he would not like to say

positively how often *this* happened, but could clearly say it was about a dozen times; may have been more, but could clearly say it was that often; have frequently come to these gates at night, both before and after 12 o'clock, when no trains were approaching and found the gates up and crossed without any trouble, and he had done this very much more frequently than he had been stopped by the gates being down; could not say exactly whether the gates were more frequently up than down at night when no trains were passing; had noticed it about a dozen or fifteen times in passing by when he would come from a ball, or something like that; had noticed gates down and no trains passing and had to holler for the gateman; this was generally after 12 and up to 3 or 4 o'clock at night (Rec., pp. 20, 21).

Kappel: In August, 1898, was working in daytime; had worked on the night force, but not during the year 1898; had occasion to cross the southwest crossing at night, immediately prior to and about the time of Landrigan's death. The gates as a general thing in the night-time were down. During the summer of 1898, and for five or six years previously, he had passed over this crossing three or four times a week at all hours of the night up to one o'clock, and that after 11 o'clock he generally found the gates down, whether trains were passing or approaching or not; after 11 o'clock the gates were generally kept down whether there was a train in sight or not; he and Landrigan used to go home together for 2 or 3 months; that they both worked at night at the time; that the gates were down and they had to crawl underneath the gates to get home; that the gates were generally kept down and they very seldom ever saw the gates up; that the times when Landrigan and the witness crossed were between 12 and 1 o'clock at night and between 6 and 7 o'clock in the morning (Rec., pp. 22, 23). * * *

CROSS-EXAMINATION: That when he crossed the tracks with Landrigan at night they were coming home to lunch between 12 and 1 o'clock (Rec., p. 23); that during the year prior to Landrigan's death he crossed at this point at night after 11 o'clock on an average of about once a week or a little oftener; that he usually found the gates down whether trains were in sight or not; that he has come there after 12 o'clock at night, when no trains were in sight, and found the gates up, but very seldom; that he has found them up *only* when somebody halloaed to the man to raise them up; that after the traffic of the day was over they would put the gates down and keep them down unless somebody asked to have them raised. * * * He always found the gateman there when he was passing at night; * * * that he has crossed over at night and found the gates up when no trains were coming, *but people were passing and halloaing to the watchman to raise the gates; that the gates* were never hoisted all the way; they were on a slant (Rec., pp. 24, 25).

Martin: Was born and raised in that vicinity; lived on South Capitol street, about half a mile below southwest crossing. He always found the gates down at the southwest crossing in the summer of 1898, after 10 or 11 o'clock at night, whether trains were coming or not; *that he did not remember a single instance when he found the gates up after 10 or 11 o'clock at night;* that he had been driving up and down there once or twice a week since about 1886 (Rec., p. 25).

CROSS-EXAMINATION: The gates were *always* down, and during the fifteen years that he had crossed there he has had to wake up the watchman two or three times probably. On the other occasions when he would come there he would call to the watchman, and he would raise the gates if there was no train coming. He thought it was the custom for him to leave the gates down. He thought it was a safeguard. He did not know any better then, and deemed it a

proper thing because of the small amount of use of that crossing at that time of night—*i. e.*, to have the gates raised when anybody wanted to go through if no train was approaching. If there was any doubt as to whether any train was approaching, the watchman would always call to the watchman on the other side and ask him if a train was coming; that he regarded these precautions of keeping the gates down at that time of night and of calling to the watchman on the other side to know whether a train was coming or the track was clear as a safeguard and a proper thing to do (Rec., p. 26). * * *

REDIRECT EXAMINATION: That he only found the watchman asleep two or three times, and the only difficulty he had in getting him to raise the gates occurred when the watchman was in his box late at night, *but always found the gates down* (Rec., p, 26).

Wilkinson: In the summer of 1898 resided on South Capitol street south of the southwest crossing; had been living there about 11 years; that he had crossed at this crossing for 12 or 15 years at night-time, after the usual bedtime. The gates were usually kept down whether trains were coming or not; that he often had to ask the man to hoist the gates, and sometimes would have to wake him up; that he crossed there at night once or twice or three times a week; that he *would not like to say any instance when he found the gates up at night* * * * (Rec., p. 27).

CROSS-EXAMINATION: That he would approach the gates from the south at night-time after 6 or 7 o'clock, and usually found the gates down; sometimes there would be 2 or 3 teams waiting there—sometimes might find trains passing or that they had just passed. * * * That generally he would not stay there, but would go through and take whatever risk attached to it; that he always got through before the engine would even get in sight; had gone under the gates and over the crossing when cars or engines were ap-

proaching; that when he returned in the neighborhood of 10 or 12 o'clock at night he would generally *find the gates down; that he could not say that he has ever come down there and found the gates up when no trains, cars, or engines were moving in that vicinity;* that when he found the gates down he would just go under the gate and go on through without calling to the watchman to raise the gate (Rec., p. 27).

Oeser: In 1897 and 1898 lived on South Capitol street, south of the railroad tracks, and had occasion to pass the southwest crossing sometimes 2 or 3 times at night; that he generally crossed this crossing 15 or 16 times each week, night and day, in going to his business at the K Street market; that he has crossed there at all hours of the night from 9 until 1 o'clock at night; *that during* 1897 *and* 1898 *the gates after bedtime were kept down all the time; that he never saw the gates up after bedtime except when some one would ask to have them raised* (Rec., p. 28).

CROSS-EXAMINATION: That on 4 different occasions during the 11 years that he lived down there he had to wake up the watchman in order to get him to raise the gates (Rec., p. 28).

REDIRECT EXAMINATION: That during the years 1897–'98 and '99 he crossed there at all hours from 6 or 7 to 12 o'clock at night and 3 o'clock in the morning; that sometimes he would find a train there and sometimes he would not, *but would always find the gates down* (Rec., p. 28).

Tripp: In the summer of 1898, including the month of August, the gates at this crossing, after the usual bedtime, were mostly kept down; that he has seen them down at 9 o'clock, and presumes that they were kept down all night. *Every time he saw them they were down, whether trains were passing or not* (Rec., pp. 29 and 30).

CROSS-EXAMINATION: That when people approached the crossing at night and wanted to cross, if they were walking, they would generally stoop under the gates and walk across.

If driving, they would have to holler to the watchman to raise the gates; that he has seen this along in the summer of 1898; that they would be up at times, but always down when trains were passing (Rec., p. 30).

B—Landrigan's Knowledge of the Condition and Operation of the Gates and His Acts and Conduct in Accordance Therewith.

See testimony of plaintiff (Rec., p. 31) and of witness Kappel (Rec., pp. 21, 22, 23).

C—Legal Effect of Such a Custom on the Conduct of Deceased in Going under the Closed Gates.

Assuming for the purpose of the argument that the plaintiff succeeded either in establishing such a custom with reference to the gates, or that the testimony on that point was sufficient under the rule to go to the jury, it is respectfully submitted that going under the gates, considering the facts of this case, was not negligence *per se*.

The principle underlying the general rule that such conduct would of itself be negligent is obviously based on the assumption that the gates are *live* gates; that they are operated in accordance with the purpose for which they are ordinarily put at railroad crossings, viz., to be lowered and closed as an indication of present danger—as a note of warning that a train or locomotive is passing or approaching, and to be raised and opened when no danger is imminent.

For one to undertake to cross the track or tracks in the face or in defiance of a distinct announcement that a train is in sight and about to go over the crossing would be negligent, reckless, and foolhardy, and a case arising out of such a state of facts would not be submitted to a jury to discuss and decide—the question would be answered by the law.

It would be wholly immaterial whether the note of warning to the pedestrian was given by a watchman, standing at the crossing, who, seeing the approaching train, should, in *words*, inform the traveler of the presence of the specific danger, or, by the waving of a red flag, should announce the train's approach, or by lowering safety gates should thereby give out the same information.

The negligence consists in going when he is told not to go!

But how different would be the situation and our characterization of the conduct of the pedestrian if the watchman should continuously, by day and by night, cry "wolf!" whether the "fold" was in danger or not, or should wave his flag of peril without regard to the presence or absence of trains and locomotives, or should lower his gates and keep them lowered throughout the hours of the day and night—lowered when trains were passing or approaching and still down when no danger anywhere existed! When a danger signal thus becomes no real signal of danger, no negligence is to be imputed to the traveler who knows the fact and acts upon it.

Cessante ratione legis cessat et ipsa lex. A fortiori, when a signal ceases to be used for the object it was intended, it ceases to indicate that object.

The Court of Appeals, passing upon the effect of a custom, in the case of Dashiell *v.* Market Company, 10 App. D. C., 81, 89, said:

"If there had been any proof of usage or custom on the part of the market men to use this elevator themselves, with the sanction, express or implied of the defendant company, the case would have been very different; but there was no such proof."

Appellants chiefly rely on two cases to support their contention that the customary condition of the gates is an immaterial matter, viz., Douglas *v.* R. R. Co., 100 Wis., 405, and Sheehan *v.* R. R. Co., 166 Pa. St., 354.

An examination of these cases will readily show that they have no real application here.

The Douglas case simply and only decides that "*what persons customarily do under similar circumstances has no application as a test of ordinary care, where the act is so obviously dangerous as to constitute negligence as a matter of law.*"

We quote from the statement of facts:

"The evidence tended to prove that at a Becker Street crossing of the defendant's railway right of way in the city of Milwaukee, it maintained its railway tracks with a gate on each side of the right of way, so operated that when the crossing was about to be used for the passage of trains, *the gates were let down so as to bar the approach to the track for the entire width of the street;* that plaintiff was familiar with the crossing and the purpose for which the gates were used; that pedestrians were accustomed, notwithstanding the operation of the gates, to enter upon the right of way as in their judgment circumstances would permit; that on a dark night between the hours of nine and ten, plaintiff approached the crossing by way of the street from the east; *that as he arrived at the gate it was let down, but he, notwithstanding, passed around it and proceeded to cross the right of way.*"

Referring to "live" gates, as these unquestionably were, the comment of the court in the opinion is peculiarly apt:

"Where gates are *so maintained,* it is the duty of travellers on approaching the right of way and observing that the gates are down or about to be let down, to stop until they are raised before proceeding. The presence of a gate across the approach to a railway track says to the traveller, in a manner not to be misunderstood, that such tracks are presently to be used for the passage of trains."

To apply such language to gates that were "dead," so to speak—that indicate nothing one way or the other as to danger or safety—would not only be inapt, but unreasonable. Can it be claimed that the presence of the gate across the southwest crossing of South Capitol street, under the

facts of this case, was tantamount to a declaration by the defendants—

"to the traveller, in a manner not to be misunderstood, that such tracks are presently to be used for the passage of trains"?

The Sheehan case is of but little value and has but little application to the facts of this case.

Three important facts should be noted in connection therewith:

(1.) It nowhere appears in the statement of facts or in the opinion of the court that the party injured had any knowledge of the custom to keep the gates lowered, or that he acted upon such custom or usage.

(2.) The plaintiff went under the gates and crossed the railroad, with the track in full view, and there was no obstruction whatever at the point of the accident, and the case largely turned upon the fact that the plaintiff could not be said to have looked and listened, and that the crossing of the railroad track, apart from the gates, under the circumstances of the case, was contributory negligence on his part.

(3.) The tracks in question were live tracks, not only used habitually for the passage of trains, but over which a train, in full view, was then in the act of passing—not a dead track.

(4.) There is but one line of comment in the opinion of the court upon the effect of the gates being customarily down, and it is evident from the perusal of the opinion that no sort of consideration is given to that fact. It may have been because it was unnecessary to consider the effect of such a custom, inasmuch as the crossing of the track itself without looking and listening was held to be negligence *per se*, wholly independently of the condition of the gates.

DUTY TO LOOK AND LISTEN BEFORE ATTEMPTING TO CROSS RAILROAD TRACKS.

A—Presumed to Have Looked and Listened.

The duty of one before attempting to cross a railroad track to look and listen for the approach of trains is so well settled and is so reasonable that no attempt on the part of the appellee is made to combat it; but it is equally well settled in this jurisdiction, both by the Supreme Court and the Court of Appeals, that, in the absence of any evidence to the contrary, *it is to be presumed in favor of the deceased that he did so look and listen.* The Supreme Court of the United States, in Continental Improvement Co. *v.* Stead, 95 U. S., 161, 194, stated the rule as follows:

"Those who are crossing a railroad track are bound to exercise ordinary care and diligence to ascertain whether a train is approaching. They have, indeed, the greatest incentive to caution, for their lives are in imminent danger if collision happen; and *hence it will not be presumed without evidence that they do not exercise proper care.*"

And the Court of Appeals in Cowen *v.* Merriman, *supra*, following the rule adopted by the Supreme Court, said:

"Whether he (deceased) did or did not look and listen for the approach of the trains, before stepping upon the tracks, nowhere appears from the evidence, except as it may be inferred; and in the absence of negative evidence, or evidence that he did not look and listen for the approach of trains the presumption would be that he did." Following Tex. P. Rwy. Co. *v.* Gentry, 163 U. S., 353, 366, and Continental Improvement Co. *v.* Stead, 95 U. S., 161, 164.

B—Does the Evidence Rebut This Presumption that He Looked and Listened?

This is the sole question remaining. In order to justify the trial judge in instructing for the defendant, the evidence rebutting the presumption that deceased looked and listened must be so strong and conclusive "that all reasonable men would so conclude."

In order to pass safely upon this question, it is not only proper, but necessary, that all the facts and circumstances surrounding the occurrence should be taken into account, among them the following:

A—The Condition of the "Ladder" Track at the Place Where Landrigan was Injured, the Use for Which That Portion of the Track was Employed, and His Knowledge of These Facts.

The following extracts from the testimony on that point justifies the court in submitting the condition and use of that portion of the ladder track to the jury:

Motley: The end of this "ladder" track, in the neighborhood of South Capitol street, was used for shifting purposes and for putting cars or anything there they wanted to store there; has never seen passenger coaches stored down there, because it is not long enough for that; the only cars he ever saw stored there were freight cars (Rec., p. 8).

It was not customary to handle passenger cars on that side, at the southwest crossing of South Capitol street. Witness and his men were freightmen ordinarily, but are called upon now and then to handle passenger cars (Rec., p. 9).

Webster: South Capitol street is divided by the reservation in the center of it, which is about 50 or 60 feet wide, thus making two crossings (Rec., p. 16). The most south-

erly of the four tracks at the crossing (southwest) goes as far as the storage yard of the company extends. The company has a railroad yard there, where they store railroad cars, rails, coal, etc. The south track extends westerly about 200 feet beyond the southwest crossing. He calls it a dead track because it does not lead anywhere; it just stops. The westerly end of this track from the southwest crossing is used to put in coal, railroad ties, iron, etc., for the use of the company; that is all it is used for. They put coal in there and unload it, and when they want it for their switch-boxes they haul it around to them. No portion of this track lying west of the southeast crossing is used for shifting or making up trains. That he has lived there all his life and has never seen any shifting or making up of trains at that point; has seen two or three flat cars there, or a load of coal or cinders, or a car containing railroad ties or iron rails. They did not store their passenger cars there; they took them further east (Rec., p. 17).

CROSS-EXAMINATION: Has seen the company shifting cars on the "ladder" track west of the southwest crossing of South Capitol street, but they were cars loaded with coal, lumber, rails, or something for their own special use, and bases this statement upon his observation year in and year out. These cars were left there. He has seen them shifted in, but could not say that he has seen them pulled out, but he is satisfied that this was done. That it would be necessary to pull them over this crossing in order to get them out. * * * As a rule, they contained coal, rails, and such stuff as that, and he assumed the material contained in the cars belonged to the company, because it was put in the company's yard, but as a matter of fact does not know of his own knowledge that the end of that track was used simply for the cars containing material belonging to the company (Rec., p. 17).

REDIRECT EXAMINATION: He supposes the railroad company owned the material that was unloaded or stored at the

end of the yard on that "ladder" track because he has seen them haul coal around to the switch-box for the men to use and naturally supposed it was their material; there is no freight yard there. It is a private yard. They use this track in connection with their storage yards (Rec., p. 19). The shifting in front of his house was generally done on the north track; they could only go about half way of the block on the south track (Rec., p. 20).

Kappel: "The portion of the 'ladder' track lying west of the southeast crossing is used for storing gravel cars and unloading coal. When they unloaded it, they shoved it down there alongside of the property yard of the railroad company and put it right over the fence. It was never used for shifting or for making up or breaking up trains or for storing passenger cars. The portion of this track east of the tower was used for shifting cars. The portion west of the tower was hardly used at all—just for storing a couple of cars down there. * * * The 'ladder' track west of the southeast crossing is always rusty, and the track that is used for shifting purposes is always bright" (Rec., p. 22).

CROSS-EXAMINATION: He notices the rust upon the south track nearly every time he passes there; noticed it "this morning;" there are four rails there that are bright—two are rusty and two others are not so rusty; has noticed this condition ever since he has been crossing there for the last 20 years; this rust was west of the southwest crossing; did not testify about the rust on the tracks at the former trial, because he was not asked the question; was asked about it this morning by plaintiff's counsel for the first time; the south track is pretty well rusted—is rusty all the time; he knows two tracks are bright, and the track furthest north not as bright as the middle tracks (Rec., p. 23); the western end of the south track was used for storing cars and taking cars in and out for the purposes of

the property yard; has seen these cars lie there two or three weeks after they were unloaded; they might have taken the cars out immediately after pushing them in, but did not see them take them out; the two cars that were on this track when Landrigan was killed had been there two or three days; that he did not know whether or not these cars had been pulled out and put back during these two or three days, but he noticed the number of one of the cars and the other looked like the same car (Rec., p. 23). * * * that this track was only an outlet to the east, but in this respect it is similar to every other track in the yard; the only way it differs from them is that it is about eight or ten hundred feet from any switch along there; on the east this track communicates with every other track in the yard by a switch (Rec., p. 24).

REDIRECT EXAMINATION: There was no shifting and making up or breaking up of trains on the southwest crossing on the south track; that this was done east of that crossing, and the only trains that crossed there, freight or passenger, were the trains that were already made up; that once in a while a passenger engine comes down from the Jersey yard, on the north side of the crossing, and switches off on another track to get a car or something like that (Rec., p. 25).

Martin: Has seen a couple of cars standing on the south track west of the southeast crossing, but has never seen them make up trains there.

CROSS-EXAMINATION: Has seen cars run in on the south track and left there, but had never seen them pulled out; had caught cars on this south track near this crossing once or twice a week—cars that he had seen there contained coal; had frequently seen them move cars backwards and forwards across the southwest and southeast crossings of South Capitol street. Sometimes trains were made up there and sometimes trains came up from the other [end this has refer-

ence to the use of the tracks generally and not specially to the "ladder" track] (Rec., p. 25).

REDIRECT EXAMINATION: Saw them making up and breaking up trains to the east of the crossing, but they would pull cars over the crossing sometimes when they had a long train; that he believed he had seen trains crossing at that crossing more frequently in the daytime than in the nighttime.

RECROSS-EXAMINATION: He had never seen much shifting done there at night (Rec., p. 26).

Wilkinson: The end of the south track is generally used to stack cars.

CROSS-EXAMINATION: He had seen cars stacked in there most always when he would pass there; can only recall seeing them move cars in there on one occasion (Rec., p. 27).

Oeser: The end of the south track, west of the southeast crossing of South Capitol street, was generally used for coal cars; they made up and broke up trains to the east up at New Jersey avenue; had never seen them making up and breaking up trains as far west as the southwest crossing of South Capitol street (Rec., p. 28).

Miller: The south track west of the southeast crossing of South Capitol street he has always considered as a storage yard, running from New Jersey avenue, parallel to the property yard; he has never known them to make up a train there; the trains are made up further east, east of the southeast crossing.

CROSS-EXAMINATION: By storage track, he means that very frequently the cars containing railroad supplies stood there for a number of days without being unloaded; he never knew a car to be put in there except for the company's purposes; has often seen cars pushed in and pulled out of there over the southwest crossing of South Capitol street. Re-

direct: Where they make up their passenger trains (Rec. p. 29).

Tripp: The south track, known as the ladder track, west of the southeast crossing, was not used for anything but storage, as far as he knew; does not think they could use it for making up and breaking up trains, because it does not run over 200 or 250 feet from the southwest crossing; they stored their passenger cars in the Jersey yards where they make up trains, and also on the north track on Virginia avenue to the east of the southeast crossing, where they make up trains; the western end of the south track was used mostly for the storage of coal, as he supposed for the use of the railroad company (Rec., p. 29).

Mrs. Landrigan: About two weeks after her husband's death, she viewed the spot where the accident happened, and noticed that the rails of the south track at that point were rusty; that this rust extended from the end of that track to the southeast crossing; that east of the southeast crossing the tracks were brighter; that the two center tracks at the southwest crossing were very bright, but the track on the north was not quite so bright as the center tracks. She has seen cars loaded with coal and railroad ties standing at times on the south track west of the southeast crossing; this portion of the track was not used for switching purposes (Rec., p. 31).

As to the ladder track, at the point where the accident occurred, it is undisputed in the evidence that it was only used to store and stack freight cars, that passenger coaches were never stored there, and that no shifting (*i. e.*, making up and breaking up trains) of either freight or passenger cars was done on that end of this track. It surely cannot be said with any force or show of reason that the degree of care imposed upon Landrigan by the law was the same in crossing this track, little used at this point as it was, as it would have been in

crossing a such a track as that involved in the case of Shehan *v.* R. R. Co., *supra*. As was said by Mr. Justice Shepard in rendering the opinion of the Court of Appeals in the present case:

"Moreover, deceased was familiar with the crossing and the gate gave him no notice of anything that he did not already know in respect of the number, proximity and use of the tracks" (Rec., p. 61).

B—The Character of the Night—Obstructions to the View—Lights on the Car and in Vicinity of the Crossing.

The testimony, compiled carefully from the record and bearing on these points, is as follows:

Motley: There was a white light in the vestibule of the Pullman car that broke away—in the little dome-shaped arrangement in the roof of the car. This was the only light hanging in the vestibule, and there was no light on the platform. * * * (Rec., p. 8.)

The crossing was lighted by the street lamps located at each of the four corners, and there was an electric light in the reservation north of the tracks [at northeast intersection of South Capitol street and the railroad tracks] and another one south and east of the tracks near the signal tower (Rec., p. 9).

The lamp in the dome of the vestibule of the Pullman car had a white shade or globe underneath. It gave a bright light; you could see it all right. The lamp was inside of the door, and the door was closed. The glass in the door extended about half-way down, and the light shone through the glass in the door. You could see the light very plainly as you looked at it. The same sort of light was in both ends of this car (Rec., p. 10).

REDIRECT EXAMINATION: The nearest electric light to the point where Landrigan was killed was on the east side of the southeast crossing and north of the tracks. This light was about seventy-five yards from where Landrigan was struck (Rec., p. 10).

Willhoit: It was dark, night-time, and witness could not see (Rec., p. 13). There was a light on both ends of the coach. There was a light in the coach, but none on the back platform (Rec., p. 14).

Witness did not stop, because by the light being in the car he thought perhaps there was a porter or somebody in there (Rec., p. 15); knows there was a light in the west end of the car, the end going toward South Capitol street, which was the front end of the car the way it was moving. This light could be seen more plainly than a lamp. Such lights contain two burners, are lighted by oil, and are more brilliant than a lantern. The reflector is over the top of the light. There is a kind of white shade over them (Rec., pp. 15–16). * * *

REDIRECT: The light in the vestibule of the car could be seen by people on the ground. It hung down low and did not set right up in the dome. It had a shade over it, but he does not know whether you could call it a reflector or not. It was plain enough to be seen by anybody who was on the ground.

Webster—CROSS-EXAMINATION: Standing at the gate on the south side of the southwest crossing the gateman's box would break the view down this side track to the east, if you stood outside of the gate. You could look up the main track, he supposed, to New Jersey avenue, but he thought the watch-box would break your view of the south track to the east to a certain extent, if you were standing outside the gate. This box is 6 or 7 feet square. He could not say that a watch-box 6 feet square would prevent you from seeing a

train if it was coming along, but it would break your view, to a certain extent, in looking up the track; that when you stood on the inside of the gate, on the open space, you could look straight up the side track to the eastward, and there was nothing to break your view (Rec., p. 18).

REDIRECT EXAMINATION: Standing outside of the gates on the south side of this crossing two cars loaded with coal or other material on the end of this track would obstruct the view of a train coming from the depot, and you would have to get out on the track if you wanted to look up the track a couple of hundred yards; that the watchman's box indicated on the map was right close to the ladder track, and farther up along that track is the tower-house, which is 25 or 30 feet high. This would have about the same effect to obstruct the view as the smaller watchman's box; it would not break the view of a train coming, but would obstruct the view and you would not have a clear view of the track; you could see one coach looking up there. * * * Witness stood on the ladder track on one occasion when the midnight express for New York was passing, and he considered it a safe place (Rec., p. 19).

Kappel: There was an electric light on thetnorth side of the southeast crossing, about 200 feet from where Landrigan was killed; had never noticed whether this electric light furnished any light of any consequence at the intersection of South Capitol street southwest; that if a train was standing on the north track, a few feet from the southwest crossing, it would have the effect of making it darker at the gates at the southwest crossing (Rec., p. 22).

CROSS-EXAMINATION: When he got there at night and found the gates down, he could not see whether there was a train in sight until he got out on the track and looked up and down; * * * the watch-box south of the ladder track interfered with the view down that track to the east; the closer you get the greater the obstruction from this box

and the further away the more view you had of that track; that he thought standing inside of the gates, the watch-box located outside the gates and next to the fence south of the track would prevent a person seeing anything up that track; that you would have to get on the track before you could see up there on account of this watch-box, the fence, and telegraph pole which were there; that west of the southwest crossing towards F street there is a curve; that you could not see around that curve until you got on the north side of the crossing; that although you could not see a train coming from that direction until you crossed the tracks, you could hear it unless there were two or three trains passing at the same time, or an engine blowing off steam; then you could not hear anything (Rec., pp. 24, 25).

Martin—RECROSS-EXAMINATION: When he approached the south side of this crossing in the daytime, it would be impossible to see towards the west, and very seldom to the east on account of the watch-box. * * * Re-redirect: The tool-house and lumber yard west of the crossing would prevent a person approaching the gate from the south from seeing an approaching train from the west; that if there were two cars standing on the south track he would be unable to see a train coming from the west unless he got outside of that track; that it would be harder to see at night than in the daytime (R., p. 26).

RE-RECROSS-EXAMINATION: Approaching this crossing from the south, after passing the gate and standing upon the space between the gate and the south track, there was nothing to obstruct the view unless a box car should happen to be standing there to the east; that the watch-box would not obstruct the view (Rec., p. 27).

Miller—CROSS-EXAMINATION: By going out on the first track you could get a very good view in both directions—probably further to the east than to the west; that if the

west end of the track were occupied by cars a person could not see any distance at all, and you would have to go past the cars that might be standing on that track. If you passed under the gate and were standing on the open space between the inside of the gate and the south rail of the southernmost track, you could see to the east a distance of about 100 feet or more (Rec., p. 29).

Jenkins: A Pullman car running slowly, as fast as a man would ordinarily run on a straight track, would make practically no noise at all—very much less noise than an ordinary passenger car; they were built purposely for that object; they are very much heavier than passenger coaches and more staunchly built; they are built with a longer truck and wheel base and softer springs; the light in the vestibule of a Pullman car is so located as to illuminate the platform only; that is the purpose of that light; it does not throw the light more than a couple of feet beyond the end of the bumper of the car; it is not intended to illuminate the track (Rec., p. 30).

CROSS-EXAMINATION: Such a light was not intended for a locomotive headlight; that if a man was standing on the track some distance from the advancing end of a car showing such a light he would not see the source of the light, but would see the reflected light on the platform on the car; he could see the illuminated end of the car. If he was not looking exactly in that direction this light would not attract his attention away from something else; if he were looking up the track, he could see the light, if he were not too far away (Rec., p. 30).

Mrs. Landrigan: The night her husband was killed was dark and cloudy (Rec., p. 31).

C—The Passing, at or about the Time of the Accident, of the Midnight Express for New York, Known as No. 78.

Willhoit—Direct Examination: Train No. 78, which left the depot about 11.55 or 11.35, was passing there about the time of the accident. This train No. 78 is known as the midnight express for New York, and crossed South Capitol street, where Landrigan was hurt, going in an easterly direction (Rec., p. 12).

Cross-examination: Witness jumped off the Lylete on the southeast side of South Capitol street; 78 passed first, and then he ran down the north-bound track behind the "Lylete" (Rec., p. 15). * * * The runaway car passed the southwest crossing of South Capitol street before No. 78 reached there. It struck just the middle part of No. 78 as the train came by there. The runaway car had just about gotten across the crossing when the engine of No. 78 began to cross the crossing. It was almost at the same time (Rec., p. 16).

Landrigan had been in the employ of the defendants for 8 or 9 years, in the round-house, as machinist. It can and should be assumed that he knew well the conditions in and about the "Jersey yards"; the character of the "ladder" track, the use to which the portion of it west of the southeast crossing was put; the fact that Pullman and other passenger coaches were never stored or stacked as far west as the southwest crossing of South Capitol street, and that no shifting was ever done on that end of this track.

Is it not fair to assume that, knowing the conditions above stated, he did look and, looking, saw the train of passenger coaches in Motley's charge going *east* along the ladder track, away from the crossing where he was to pass? Would he

not have a right to infer that the coach or coaches would not come *west* if he saw the train *already* going *east*, and knew that no shifting was done at or near the southwest crossing and that no passenger or Pullman cars, such as Motley's train consisted of, were ever shifted or stored at the crossing, or caused to pass over it?

There is another factor to be reckoned with in passing upon this question, to wit, the passing, at that time, of No. 78.

Landrigan may have looked and seen the shifting train going *east* and *from* him, as suggested above, or he may have looked at the moment of attempting to cross the ladder track, where his vision was obscured by the smoke from the locomotive of No. 78, blown across the ladder track, the character of the light in the "Lylete" increasing the probability of just such an obstruction. He may have listened while the roar and rush of the coming express destroyed the little noise the slowly moving Pullman made as it came down this ordinary grade of the "ladder" track. He may have gone under the gates, stood on the vacant, safe place between the gate and the "ladder" track to ascertain the approach of No. 78 (for the witnesses say he would have to do this to have a view unobstructed), and, seeing No. 78 *coming toward him* and the shifting train *going from him*, awaited the passing of the former.

Can it be said that the evidence here is so strong that the deceased did not look and listen "that all reasonable men must draw the same conclusion"?

How strikingly like the case at bar are the facts of the Merriman case, *supra*. Mr. Chief Justice Alvey thus states them:

"It is shown, however, that the condition of things existing at the crossing of the road at L street, where the accident occurred, was not favorable to entire safety to those using the crossing. It was near midnight that the accident occurred; the weather was blustering, and there was no

moonlight, and some of the witnesses speak of the night as cloudy and dark, but others say it was clear. The gates at the crossing were raised, and there was no watchman or light at the crossing. There was a passenger train coming into Washington that passed over the crossing just before the deceased reached it and attempted to pass over it. At the same time, coming out of Washington and going in the direction of Baltimore, were an engine and tender, and the proof is conflicting as to whether this engine and tender were running head or tender foremost. It was this engine with the tender that collided with the deceased and caused his death; the collision occurring at or near about the crossing. The meeting and passing in opposite directions of the passenger train, going into Washington, and the engine and tender going in the direction of Baltimore, occurred west of, but not very far from the crossing of L street. Some of the witnesses speak of smoke emitted from the passenger train, but others do not seem to have observed it."

The comment of this court upon the brief of counsel for railroad company in the Gentry cases furnishes such a conclusive answer to much of appellants' brief in this case that we quote from it the following:

"The counsel for the defendant, in their elaborate brief, say: 'Plaintiffs below cannot claim that the headlight of the engine did not illuminate and make plain to any one the flat car. They may contend that the headlight blinded the deceased. If this be true, he knew that switch-engines with flat cars attached in front and behind them were continuously moving in and about the yard, and if the light did blind him he knew then and there the blinding effects thereof, and it was as careless for him to step upon the track just in front of a car as it would have been for a blind man to have so acted. We submit that if he was blinded by the headlight that he was guilty of the grossest negligence, being blinded, in walking upon the track under the existing circumstances. We submit, however, that the evidence shows without contradiction that, by the exercise of ordinary care, he could have seen the flat car. We submit that a blind man who would attempt to cross the track just in front of the engine, the puffing and blowing of which he could hear,

hoping to get across the track before the engine could strike him, would be guilty of the grossest negligence. In this case the deceased was not blind. He could see the engine with its headlight illuminating 15 or 20 feet of the flat car next to the deceased, and lighting up the track for some distance ahead.'

"It is sufficient to observe that the evidence touching the matters referred to by counsel was not so clear and satisfactory as to justify the taking of the case from the jury upon the issue whether the deceased exercised due care under the circumstances which attended the occasion. It was properly left to the jury to determine whether, under all the circumstances, the effect of the headlight and flat car combined was to make the situation secure and safe to one who saw the headlight, but did not see the flat car in front of the locomotive. 'What may be deemed ordinary care in one case,' this court has said, 'may, under different surroundings and circumstances, be gross negligence. The policy of the law has relegated the determination of such questions to the jury under proper instructions from the court. It is their province to note the special circumstances and surroundings of each particular case, and then say whether the conduct of the parties in that case was such as would be expected of reasonable, prudent men under a similar state of affairs. When a given state of facts is such that reasonable men may fairly differ upon the question as to whether there was negligence or not, the determination of the matter is for the jury. It is only where the facts are such that all reasonable men must draw the same conclusion from them, that the question of negligence is ever considered as one of law for the court'" (Texas & Pacific Rwy. Co. *v.* Gentry, 163 U. S., 353).

Very little need be said of the complaint by appellants that the trial court refused sundry prayers offered by defendants and granted sundry prayers offered by plaintiff. They raise, in effect, the same question as that heretofore discussed, viz., whether it was error to refuse the motion to instruct the jury to return a verdict in favor of defendants.

Something has been said about error having been charged in the refusal of the court to instruct the jury in the exact

language selected by counsel for defendants. Mr. Justice Bradley, in The Continental Improvement Co. *v.* Stead, 95 U. S., 161, disposes summarily of this sort of contention.

"But a judge is not bound to charge upon assumed facts in the *ipsissima verba* of counsel, nor to give categorical answears to a juridical catechism based on such assumption. Such a course would often mislead the jury instead of enlightening them, and is calculated rather to involve the case in the meshes of technicality, than to promote the ends of law and justice. It belongs to the judicial office to exercise discretion as to the style and form in which to expound the law and comment upon the facts.

And referring specifically to one of the prayers offered, adds:

"It states such duty with the rigidity of a statute, making no allowance for modifying circumstances or for accidental diversion of the attention to which the most prudent and careful are sometimes subject; and assuming, in effect, that the duty of avoiding collision lies wholly or nearly so on one side."

It is submitted that there is no error disclosed in the record, and that the judgment of the court below should be affirmed.

J. J. Darlington.
Chas. A. Douglas.
Jos. D. Wright.